The Madras Law Journal.

VOL. XVIII.] NOVEMBER, 1908. [PART XXII.

THE LATE SIR V. BHASHYAM AIYANGAR

By the death of Sir V. Bhashyam Aiyangar on the 18th of November last India has lost her foremost lawyer. After a distinguished college career and a period of Government service as Registrar, he joined the bar in 1872 and made his mark in the profession almost immediately after he entered it. He had taken the first place in the first class in the B. L. Examination of the University, beating the late Sir T. Muthusawmi Iyer (Mr. Muthusawmi Iyer as he then was) already distinguished as a student of law. Habits of industry and thoroughness acquired in his school and college career became fully developed and established under the guidance of Mr. P. O' Sullivan, a former Advocate-General. Within a period of ten years Mr. Bhashyam Iyengar rose into prominence, and divided the honors and emoluments of leadership with Mr. Ramachandraiyar (afterwards Mr. Justice Ramachandraiyar of the Bangalore Chief Court) and the late Rajah T. Rama Rao. In 1885 Mr. S. Subrahmanya Aiyar, the distinguished Advocate and Judge now in his retirement, joined the Madras Bar. For a period of ten years, until Mr. Subrahmanya Aiyar was elevated to the Bench in 1895, Mr. Bhashyam Aiyangar and Mr. Subrahmanya Aiyar were the foremost men at the bar, the former easily carrying off the palm as the profounder lawyer and jurist, while the latter was more brilliant as the forensic orator and advocate. Mr. Bhashyam Aiyangar was *facile princeps* distancing all competitors and contemporaries during the remainder of his forensic career from 1895 down to the hour when he broke down in the midst of a subtle argument and was carried unconscious to the Chamber. In the Legislative Council of Madras his work was marked by a thorough

mastery of legal principles and acquaintance with the wants of the country, and much of the legislation of the Provincial Government bears the impress of his mind. Successive Governors and Governments appreciated his services and conferred upon him various titles and marks of honor. *He* made the discovery that a vakil was legally qualified to be appointed Advocate-General, and an appreciative Government, eager to recognize talent, rewarded him with that place. He was the first member of the Indian Bar to receive the unique honor of knighthood. When he was raised to the Madras Bench, we expressed the hope "that the authorities would see their way to retain his services for a period sufficiently long to enable him to leave the impress of his mind upon the judicial work of the country." Little did we think that he could leave that impress in the short period of 2 years and 9 months which was all that a hide-bound system allowed to him of judicial career. During that period, he did more than any other Judge of the Madras High Court since its creation to purge the Madras Reports of erroneous decisions.

In January, 1904, he left the Bench and resumed practice in the teeth of much disapproval of friends and acquaintances. During the four years and odd he was again at the bar he retained his great powers unimpaired, though there were occasional signs of physical strain. Though he lingered for two days after the sudden collapse, he practically died amidst the scene of his labours, almost the last sentence that his lips uttered having been addressed to the Bench.

A great career has closed. A lawyer of deep learning, an advocate of remarkable power, and a jurist of exceptional breadth of view, he has left no equal behind him. He was a man of indomitable will which rarely showed itself in ordinary intercourse with men. Nobody has cultivated to greater perfection, in our experience, the difficult art of accurate expression. The thoroughness with which he mastered the facts and the law of every case he handled, few were in a position to realize and appreciate, who merely witnessed the exhibition of his subtlety of intellect and his resourcefulness of forensic argument. He believed in exhaustive study of every question as the first condition of forensic success. He carried his habits of exactitude so far that while on

the Bench he insisted upon every practitioner stating his position with accuracy to the extent of disconcerting even older members of the profession. He was not a man who took others into his confidence readily, but his keen judgment of men and things and in departments far removed from his professional interest was of great value to those who were privileged to have access to his inner circle of acquaintance. He was singularly fair in his judgment of others and loath to suspect or to attribute questionable motives to others when their character or conduct was under discussion. He had a kind heart behind an almost icy reserve of manner which sympathized with the difficulties or sorrows of those who were in contact with him. He was great as an advocate, if the test of advocacy is not the mere literary excellence of form, or the impassioned oratory calculated to get verdicts from juries, but the art of captivating and capturing the intelligent listener anxious to arrive at a correct conclusion upon the matter placed before him. His death has left a void not easy to fill in the legal world. His name will live for generations to come, as one who was an ornament to the profession to which he belonged and raised it to a level which could not have been dreamt of when his connection with it began.

We give below the tributes that were paid to his memory when, the day after his death, all the Judges of the Court assembled on the Bench to do him honor.

IN THE HIGH COURT.

On their Lordships the Chief Justice, Mr. Justice Wallis, Mr. Justice Miller, Mr. Justice Munro, Mr. Justice Sankaran Nair, Mr. Justice Abdur Rahim and Mr. Justice Pinhey taking their seats in the First Appellate Court at 12 noon on the 19th November, the Hon. Mr. P. S. Sivaswami Aiyar, Advocate-General, addressed the Court thus, the members of the Bar standing :—

THE ADVOCATE-GENERAL'S SPEECH.

MY LORDS,—It is my mournful duty to announce to your Lordships the melancholy news of the death of Sir V. Bhashyam Iyengar at 7 o'clock last night. It is the close of an illustrious career, unique in the annals of the Bar of this Presidency. It is too often the lot of lawyers to work their way to success by struggling against adversity. Sir Bhashyam, however, was fortunate

enough to be born in affluent circumstances, and his great talents never felt the chilling influence of narrowness of means. After a distinguished career at College, he entered the Registration Department, and held for some years the post of District Registrar, which in those days was far more lucrative than now, and left him ample leisure for a close and extensive study of Law. When he appeared for the B. L. Examination, he had no difficulty in securing the first place in the first class, and, what was even a greater distinction, he stood above that other great Indian, the late Sir T. Muthusawmy Iyer. As an apprentice he attended the chambers of Mr. P. O'Sullivan, whose name is still remembered by us for his thoroughness as an Advocate, his devotion to duty and his perfection of character. If Sir Bhashyam wanted any example of thoroughness and devotion to duty, he found it in Mr. O'Sullivan. Master and pupil soon appreciated each other and became friends for life. The master made a remarkable prophecy which did as much credit to his freedom from prejudice as to his foresight. He predicted that Sir Bhashyam would one day become the Advocate General of Madras—a prediction which we know was fulfilled. Sir Bhashyam's career at the Bar was one of smooth sailing and uninterrupted success. His natural aptitude for Law, his extraordinary gifts and his solid attainments were bound to bring him to the top of the profession. From the beginning he cultivated a very capacious memory by the practice of never taking notes and depending upon his memory alone. He argued the heaviest cases without a single scrap of note in his hand, without the least hesitation and without ever losing the thread of his argument. Another valuable art which he cultivated was the habit of thinking amidst distractions. He had some trifling disadvantages to contend against; he had not a prepossessing delivery or manner; his was not the charm of style. But he had the greater spell of a commanding intellect, of subtlety of analysis, of cogency of reasoning and precision of language. One had only to listen to him for some minutes to feel the fascination of that masterly intellect growing on one. It was a privilege and a feast of intellect to hear him unravel the facts of a complicated case or expound a difficult question of Law. The dry, clear light of his intellect illuminated every nook and corner of the subject, however obscure. As an Advocate, the characteristics which distinguished him were his thoroughuesss, his wary circumspection, the studied presentation

of his cases, his readiness of resource, his ability to pounce upon the weak points of his adversary's case, his tact and his successful management of the Judges. With all these qualifications he soon rose to eminence, and there was hardly any case of great importance in which his services were not retained.

At a comparatively early period of his career he was appointed by the Government to the Legislative Council, and he became the trusted adviser of the Government under successive Governors, all of whom had the highest regard for him. In the Legislative Council he was often required to draft Bills, and those who know the work done by him know that his skill as draftsman was supreme. It was only befitting that his services to the Government and his great merits should be rewarded with the gift of the Advocate-Generalship. He was the first native of India to hold that high office, and to him we owe the discovery that there is no legal impediment to the appointment of a Vakil to the office. The appointment spread his reputation as a great lawyer throughout India, and his fame spread still more widely after his acceptance, at a heavy pecuniary sacrifice, of a Judgeship of the High Court. As a Judge he displayed a remarkable fearlessness and independence. He carefully studied every case, as he was wont to do at the Bar, and his great acumen, width of grasp and mastery of legal principles enabled him to get through his work with great rapidity. He had an unerring legal instinct which led him to the correct solution. He was never technical, except for the purpose of defeating a technicality, and was no respector of precedents which were not supported by principles, and he never shrank from the task of laying down general principlesss His judgments were, and will be, admired throughout India as models of close reasoning, discursive examination of the subjects, elaborate research and precision of language. The numberless *obiter dicta* in the judgments of this great Judge were made on purpose to stimulate thought, and are valuable alike for their suggestiveness and their soundness. He was able to see all the qualifications by which many legal propositions are hedged in and which escape the notice of others.

My Lords, the debt owed by the Vakils to him is immense. No one has done more than Sir Bhashyam to raise the position and prestige of the Vakils. It may not be possible for others to

own his extraordinary abilities. But it should be possible for all of us to follow his example of thoroughness and devotion to duty. He has passed away in the plenitude and vigour of his faculties after a life of strenuous and unceasing work. But his example remains to us. In him the Indian community has lost one of its foremost men and an invaluable counseller who could always be depended on for safe advice. To the Bar his loss is irreparable. We feel that one of the brightest legal luminaries has passed away from the Indian legal firmament.

MR. C. F. NAPIER'S SPEECH.

Mr. C. F. Napier next addressed their Lordships thus :—

My Lords,—My friend the Advocate-General has addressed your Lordships on the subject of the attainments of the late Sir Bhashyam Iyengar with a familiarity which it is, of course, impossible that I, speaking on behalf of Barristers, Advocates and Solicitors of this Court, can possess. He, and those whom he represents, knew him as juniors. They sat at his feet, and I may say, on behalf of those whom I represent, that they could not have sat at the feet of one more worthy of admiration and respect. What, My Lords, I can say of the late Sir V. Bhashyam Iyengar can be but an impression, but it is an impression both vivid and intense, because the late Sir Bhashyam was, indeed, a most striking personality. No one who knew him in his two different careers in this Court could fail to have been struck by, what I may call, the intellectual appearance which dominated him. He was a man of striking physical characteristics and striking intellectual attainments. My Lords, as an Advocate he was in his peculiar class of work supreme. My friend naturally knows his methods better than we can possibly know ; but there was one thing which was a gift most obvious to all, and that was the minute care with which he dealt with all propositions both of law and fact in the course of his arguments. With regard to his legal attainments, words are superfluous. I would speak of him as a fine lawyer and your Lordships will understand when I use the word "fine" I am referring to the peculiar quality of his intellect, because it was characteristic of the late Sir Bhashyam Iyengar that the refinements and subtleties of Law appealed to him peculiarly. His mind was perpetually studying the subtle distinctions of various

propositions. He subjected all propositions to a careful analysis; and so it was, when one listened to the late Sir Bhashyam Iyengar arguing, one felt that there was a man to whom all the niceties and delicacies that could be considered in a legal point were apparent and patent. These appeared to us to be his characteristics as an Advocate. But, My Lords, when he rose to the Bench, I think I am right in saying that we realised that he was something more than a refined and delicate student of Law; that he was a great lawyer. I specially refer to the observations of the late Sir Bhashyam Iyengar from the Bench during the conduct of a case, because it will be in the memory of all of us that those observations were both luminous and instructive to a degree; and then, when examining his judgments, I can only say that one felt that one was in the presence of a lawyer with great grasp. It might be said that his judgments sometimes travelled outside the particular points which had to be considered. That may be so; it was the result of his intellectual tendency; but that they were comprehensive on the subject he dealt with is a matter which cannot be doubted. So we had in the late Sir Bhasyam a most striking figure both as an Advocate and Judge. But there is one thing more which I, representing Barristers, Advocates and Solicitors of this Court, would like to refer to; that is, to the courtesy which was his great characteristic. There is no one of us here who knew him, who did not, when we met him, experience that courtesy and that kindness. Of course we were all younger, and naturally we treated him with the deference and courtesy which was due to a man of his standing and position; and we always felt when he was addressing us that he spoke courteously and kindly. I would say, My Lords, that his manner was that of a gentleman of the old school. Such, My Lords, was Sir Bhashyam to us, and as such he will be remembered by us here for many years and by all those who have heard of his fame.

THE CHIEF JUSTICE.

His Lordship the Chief Justice said:—

MR. ADVOCATE-GENERAL AND MR. NAPIER:—It was with profound regret that we received this morning the sad intelligence of the death of Sir V. Bhashyam Iyengar. On behalf of my colleagues here to-day I desire to associate myself with what has

been said at the Bar with reference to the late Sir Bhashyam Iyengar. It is difficult to add anything to the eloquent tributes which have been paid by the Advocate-General and Mr. Napier to the character and attainments of the great man who has just passed away. I am told that it was his desire that he should die in harness. He has had that desire fulfilled. It was only on Monday last that he was arguing a heavy case before my learned brother Mr. Justice Abdur Rahim and myself. We saw some signs of physical distress which caused us some apprehension; but until the Court rose for the mid-day adjournment he never failed or faltered, and within a moment after leaving the Court he was struck down. His reputation as a great Judge and great Lawyer is not limited to this Presidency or to this country. His great intellect, an intellect which the Advocate-General aptly described as at once subtle and commanding, his wide and deep learning, enabled him to render services to the State the value of which it is difficult to over-estimate. As we all know, he was a Judge of this Court for some two years and a half, and the Advocate-General, in language which I cannot possibly better, has given us an eloquent and graphic description of his work as a Judge. His tenure of office as a Judge was all too short and, owing to the exigencies of Rules, he had to retire from the Bench when his great intellectual powers were absolutely unimpaired. But during the comparatively short period of his occupation of office as a Judge of this Court he was able to make an indelible impress upon the course and development of the Law, especially the Hindu Law, in this country. The pages of our Law Reports during the time he was in office, bear eloquent testimony to his marvellous industry and to the depth and profundity of his learning. One feels that in the death of Sir Bhashyam Iyengar a land-mark has passed away. His position, as has been well said, was absolutely unique, and it is no ordinary commonplace, but literally true, to say that his position cannot be filled by another hereafter, however able and worthy he may be. He stood as *facile princeps* in this country with regard to his wide and profound knowledge of Law and all cognate subjects. His unfailing courtesy has been aptly described by Mr. Napier. Here, of course, one thinks of him and speaks of him as a great Advocate and as a great Judge, but it was not inappropriate that the Advocate-

General should refer to the services which he was able to render to the State as a Member of the Legislative Council. After a long and strenuous life he has passed away to his rest full of years and full of honours. I would desire, on behalf of my colleagues and myself, to express to Lady Bhashyam Iyengar and the members of his family our sympathy with them in their great bereavement. And I believe that sympathy should be extended beyond the immediate circle of his family, for it is well-known that outside the circle of his immediate relatives there were many who were to a great extent dependent upon his charity. As a mark of respect to the memory of the great Advocate and great Judge, the Courts and the offices will be closed for the remainder of the day.

CAN A MINOR TAKE A MORTGAGE?

" It remains to observe a difference between the incapacity " of minors, and that of women under the power of their husbands; " the latter are incapable of contracting, without being authorised; " they can no more oblige others towards them than they can " oblige themselves; they cannot even accept a donation which " may be made to them. On the contrary, minors who begin " to have some use of their reason are rather incapable of obliging " themselves by a contract than absolutely incapable of contract- " ing; they may, by contracting without the authority of their " tutor or curator, oblige others to them, although they cannot " oblige themselves to others." (POTHIER on *Obligations*, p. 31).

The same result is expressed by saying that in the one case the contract is only *voidable* and in the other case *void*. Thus, if a minor is not competent to contract in the sense that any agreement entered into by him is void, he can neither sue nor be sued upon it (see *Mir Sarwarjan* v. *Fakharuddin*[1]) but if it is only voidable, it is binding on the other party and the minor can sue upon it though he cannot be sued. Under the English Common Law, an infant's contract is generally voidable; and though the Infants Relief Act declares generally that "all accounts stated with infants shall be absolutely *void*" (apparently with reference to *Williams* v. *Moor*[2]) as well as contracts for goods supplied or

1. (1906) I. L. R 34. C. at 170. 2. (1843) 11 M. & W. 256.

to be supplied, its operation is likely to be restricted to goods supplied *to* (and not *by*) an infant and to accounts of debts due *by* (and not *to*) an infant (See BENJAMIN on *Sales*, 5th Edn., p. 44).

It has now been settled for India (*Mohori Bibee* v. *Dharmadas Ghose*[1]) that under S. 11 of the Contract Act a minor is absolutely incompetent to contract. Any agreement entered into by him is void and not merely voidable. The decision must give rise to several difficult questions.

Section 7 of the Transfer of Property Act requires a contractual capacity only *in the transferor*. Can an incompetent person, like a minor, be a transferee of property? It will probably be going too far to say that he is "legally disqualified to be transferee" [S. 6 (*h*)]. S. 127 indicates that he may be a donee. With some hesitation Messrs SHEPHARD and BROWN add: "And, it is apprehended, a mortgage may validly be made in his favour" (Commentaries on the Transfer of Property Act, 6th Edn. p. 52). In support of this statement reference is made to *Behari Lal* v. *Beni Lal*[2]. But the observations of *Stuart* C. J. in that case proceed on the old principle that the infant's incapacity is only for his benefit and that his contract is binding on the other party. The statement of JONES (*Mortgages*, S. 131) that an infant may take a mortgage is in part also based on this principle: "The disabilities which prevent the making of a valid mortgage in no case prevent the taking of a mortgage, which is for the benefit of the mortgagee." Dr. GHOSE practically repeats this statement (*Law of Mortgage*, 3rd Edn., p. 252). In the former editions of his work on Minors, Mr. TREVELYAN stated generally that "a transfer to a minor, whether by way of sale, mortgage, lease or gift will be upheld, if for his benefit." But in the third edition (1906) he adds the following foot-note (p. 32): "A minor who lends money on a mortgage is in a worse position than an adult, as, in regard to recent decisions (meaning *Mohori Bibee* v. *Dharmadas Ghose*[1] among others), he cannot enforce the agreement to repay the money, and would, therefore, in case of sale, be unable to recover any sum which might be due in excess of the proceeds of the sale. It would, therefore, in many cases, be unsafe for a minor to lend his money even on a mortgage security."

1. (1903) I. L. R. 30. C. 539 P. C. 2. (1881) I. L. R. 3. A. 408.

On the other hand it is stated in COOTE on *Mortgages* (7th Edn., p. 531) that infants "are, of course, incapable of lending money on mortgage."

In *Meghan Dube* v. *Pran Singh*[1] it was argued that on the principle of *Mohori Bibee's case*[2] a mortgage in favour of a minor is void and cannot be enforced by him, but the learned Judges (*Banerji* and *Richards* JJ.) held that the question did not arise in the case as the mortgage there was made in favour of a joint family though the deed was executed in the name of one of the members of the family, a minor.

If a minor lends money and takes a mortgage, what are his rights according to the law in India? All systems of jurisprudence recognise a "juristic capacity" in infants, as contradistinguished from a "disposing" capacity. An infant is a "person" in law and can ***hold*** property, real or personal. It is said: "In general, any one capable of holding real estate may be a mortgagee" (JONES on *Mortgages*, S. 131). But this only implies that there is no legal prohibition against a minor being a mortgagee. The question whether a mortgage or sale in favour of a minor will vest anything in him is different. These transactions involve a contractual element (see S. 4 of the Transfer of Property Act) and so far, the minor's incapacity stands in the way of his enforcing them. Can the property or any interest therein, however, pass to the minor, independently of the contract?

Turning for an analogy to the English Law, S. 1 of the Infants Relief Act provides that "all contracts for goods supplied or to be supplied* * *shall be absolutely void." It has, indeed, been suggested that "void" here only means "incapable of ratification so as to charge the infant," and that the provision does not prevent an infant from enforcing such a contract, at any rate where he has paid money under it (see Mr. CAMPBELL'S Note to *Warwick* v. *Bruce*;[3] CHITTY on *Contracts*, 14th Edn., p. 145). But this view has not been generally accepted (see for instance, BENJAMIN on *Sales*, p, 44), and Sir WILLIAM ANSON *at one time* felt great hesitation in saying whether the infant could at least recover the money paid by him, where the goods have not been delivered. "It is hard to see how any remedy is available *ex contractu* * * *. Since the Act, the contract is void; it

1. (1907) I. L. R. 30. A. 68. 2. (1903) I. L. R. 30 C. 539 (P.C.)
3. (1833) 14 R. R. 684.

never had an existence; and it would seem as though money paid under it was paid voluntarily." (*Law of Contract*, 5th Edn., p. 111).

In *The Queen* v. *MacDonald*[1] it was held that, in spite of S. 1 of the Infants Relief Act, "the delivery of goods on a condition (bailment) to an infant must create in him a special property which is so far recognised and protected by the law, that he could bring an action, while the special property lasted, against any person depriving him of the goods." (As to the ambiguity of the expression "special property," see GHOSE on *The Law of Mortgage*, p. 145). In *Ayers* v. *The South Australian Banking Co.*[2] it was observed by the Judicial Committee with reference to a clause in a Bank's Charter that it shall not be lawful for the Bank to make advances on merchandise: "Whatever effect such a clause may have, it does not prevent property passing either in goods or in lands, under a conveyance or instrument which, under the ordinary circumstances of law, would pass it." (See also, *Turner* v. *The Bank of Bombay*[3]). Relying on these cases Sir FREDERICK POLLOCK argues that if in pursuance of a contract of sale, goods *are delivered* to an infant, it does not follow from S. 1 of the Infants Relief Act that no property passes. But apart from delivery, he admits that from the enactment that "contracts for goods supplied * * * shall be void" it seems to follow that no property will pass to an infant under the contract of sale. (*Principles of Contract*; 7th Edn., pp. 64, 65—see also ANSON'S *Law of Contract*, 11th Edn., p. 134). Even where the goods have been delivered, if the infant does not pay for them—he cannot, of course, be *sued* for the price—Mr. BENJAMIN is of opinion that "while the goods remain in existence, the seller can, by demanding them back, revest the property in himself and sue the infant *in detinue*" (*Law of Sale*, 5th Edn., p. 45). And where the money has been paid and the goods received, the transaction may stand, but "it must be regarded", said ANSON, "as a gratuitous delivery of goods on the one side and a voluntary payment of money on the other" (5th Edn. p. 111, foot-note.) In the later Editions, this foot-note has been omitted, and in the body of the book the question is left open. (See 11th Edn., p. 129).

1. (1885) 15 Q. B. D. 323. 2. (1871) L. R. 3 P. C. 548, 559.
3. (1900) I. L. R. 25 B. 52.

Where the minor has enjoyed some benefit under the agreement he will not be entitled to recover any money paid by him—*Valentini* v. *Canali*.[1]

Taking next, the case of a married woman, her disability was almost entire at common law. There were some exceptions, and among them was the capacity of a wife to buy land in fee; it was only voidable by the husband and also by the wife after her husband's death (PARSONS on *Contracts*, S. 365.) But so far as the general rule of incapacity applied, she could acquire no property under her contract. Thus in *Smith* v. *Plomer*[2] it was held that a tradesman supplying a married woman (living apart from her husband) with furniture upon hire did not thereby divest himself of the *present* right of property in such goods, and therefore, if the Sheriff take such goods in execution at the suit of the husband's creditor, trover lies by the tradesman. In the course of the judgment, Lord *Ellenborough* C. J. said:—"In order to maintain trover, the plaintiff must have a present right of property in the goods; the first question, therefore, is whether the plaintiff had put the right of property out of him by a valid contract for the hire of the goods with Mrs. East? If the contract were for a year, it would put the property out of him for that time; or if, according to Mrs. East's evidence, the hiring were only general, without determining either price or time, it would operate as a contract, for reasonable price, so long as both parties pleased; and still the property would be out of him for the time, if it were a valid contract. That brings it to the question whether Mrs. East, being a married woman, could make a valid contract for the hire of the plaintiff's goods."

Arguing from the above analogies, it would seem that under a law which enacts a rule of *absolute* contractual incapacity in the case of a minor, a sale to him would pass no property. But whatever may be the effect of a sale, at any rate where it has been completed by payment of the price and delivery of possession, a mortgage stands on a somewhat different footing. It, no doubt, bears some resemblance to a sale, in so far as it involves the transfer of an "interest" in property, but the "security" is one created by contract (FISHER on *Mortgages*, Ss. 1 & 2.)

1. (1889) L. R. 24. Q. B. D. 166. 2. (1812) 15 East 607.

The relation in which a mortgagee stands to the subject of his security is not easy to define, but his interest is not merely a *jus ad rem* (*Walsh* v. *Reg.*[1]) Even in the form of a simple mortgage, it is "a right *in rem* realisable by sale given to a creditor by way of accessory security to a right *in personam*" (HOLLAND'S *Jurisprudence*, 8th Edn., p. 292.) The personal liability of the debtor is, in a sense, separable from the obligation *in rem* created by the mortgage, and the one may be enforced even where the other cannot be. For instance, the mortgage may fail for want of registration, the personal liability may nevertheless be enforced; or the enforcement of the personal liability may be barred by the law of limitation, but the mortgage may nevertheless be realised by sale. And some cases—into the soundness of which it is not now necessary to pause to inquire—have held that the mortgage interest is an "estate" which can be acquired by prescription by a trespasser on the mortgagee's possession and that such trespasser may then claim to be redeemed, though he is an absolute stranger to the contract of *loan* (*Ismdar Khan* v. *Ahmed Hussain*[2] and the cases there cited.)

A recent writer, discussing the true nature of a mortgage, states: "A mortgage is a right which is in its own nature an independent or principal right, and not a mere security forano ther right, but which is artificially cut down and limited so that it may serve in the particular case as a security and nothing more. * * * The right of the *lienee* is vested in him *absolutely* and not merely by way of security; for it is itself nothing more than a security. The right of a *mortgagee*, on the contrary, is vested in him conditionally and *by way of security only*, for it is in itself something more than a mere security. A lien cannot survive the debt secured; it ceases and determines *ipso jure* on the extinction of the debt. * * * (But the mortgage right) will or may remain outstanding in the mortgagee even after the extinction of the debt * * * it must be retransferred or surrendered to the mortgagor, and the right of the mortgagor to this reassignment or surrender is called his right or equity of redemption." (SALMOND'S *Jurisprudence*, 2nd Edn., p. 409). [Cf. sections 58(*a*) and 60 of the Transfer of Property Act. See also KELLEHER on *Mortgage in the Civil Law*, S. 4.]

1. L. R. (1894) A. C. 144. 2. (1907) I. L. R. 30. A. 11.

It might, perhaps, be said that the mortgage will vest the *real* interest in the infant mortgagee, free of the contract which restricts such interest to a mere *security*. But a loan, present or future, or an engagement which may give rise to a pecuniary liability, is a necessary foundation for the creation of a valid mortgage, and this is none the less so in cases in which there is no personal liability under the mortgage, *e.g.*, usufructuary mortgages, or mortgages by way of conditional sale. A completed sale, in pursuance of a void contract, may stand as a gift, but there can be no *voluntary* mortgage, *i. e.*, one unconnected with an *enforceable* debt. " A consequence of its special purpose is that of being an accessory right * * * (and) it follows that a mortgage completely follows the fortunes of the debt. If the debt is absolutely void, so also is the mortgage; if voidable only, the mortgage also is voidable" (KELLEHER, S 7). If the money lent by a minor cannot be recovered *in enforcement of the contract of loan*, there is no debt in respect of which a mortgage can take effect. In the words of Lord *Halsbury*, " if the original thing without the mortgage is in itself void, you can neither make it better nor worse by the fact of there being a mortgage'—*Nottingham P. B. Society* v. *Thurstan.*[1]

If, however, it be the theory of the law that some *real* interest, nevertheless, passes to the minor under the mortgage, he will hold it in trust for the mortgagor. For, what else can he do? A suit for foreclosure or a suit for sale is in law a suit to recover money on the contract (see GHOSE, *Law of Mortgage*, p. 85) but he cannot enforce the contract. Putting the same thing in another form, the right to foreclose or sell arises under S. 67, only *after the mortgage money has become payable*. Unless he is entitled to recover the money, he cannot sue for foreclosure or sale.

In the foot-note already quoted Mr. TREVELYAN draws a distinction between the right to obtain a decree for sale and the right to obtain a decree for the balance under S. 90 of the Transfer of Property Act, and he considers that the only effect of the minority of a mortgagee is that he cannot have the latter right because it is an enforcement of the personal covenant. But the right of sale is equally the enforcement of an agreement. For, in a simple mortgage, the mortgagor " agrees, expressly or impliedly,

1. L. R. (1903) A. C. at 9.

that in the event of his failing to pay according to his contract the mortgagee shall have a right to cause the mortgaged property to be sold, &c."—S. 58 (*b*). In a mortgage by conditional sale, the right to foreclose is based on the *stipulation* (Regulation XVII of 1809) or *condition* [S. 58 (*c*) of the T. P. Act] that on default of payment of the mortgage-money on a certain date, the sale shall become absolute. And in an usufructuary mortgage, it is the agreement of the mortgagor that authorises the mortgagee to apply the rents and profits of the mortgaged property in a particular way. Sections 67 and 72 must be construed in the light of S. 58 and subject to the rule that in all statutes containing general words, there is an implied or virtual exception in favour of persons whose disability the common law recognises—(PARSONS on *Contracts*, Ss. 334 and 335; *Stowell* v. *Lord Zouch*[1]; *Newry and Enniskillen Railway Co.* v. *Coombe*[2]; *N. W. Ry. Co.* v. *Mc. Michael.*[3] The Transfer of Property Act has to be read as part of the Contract Act.

Is the minor then to lose the money advanced by him or has he any means of recovering it?

(*To be continued.*)

NOTES OF INDIAN CASES.

Aiyathurai Ravuthan *v.* Santhu Meera Ravuthan. —I. L. R. 31 M. 252.—It is some relief to know that the numerous conflicting decisions as to the relative scope of Ss. 26 and 28, C.P.C., in respect of the joinder of plaintiffs and defendants will shortly cease to have any practical importance. The new Code employs *identical* language in both the corresponding provisions (Order I, Rules 1 and 3) and they allow a much wider latitude. As to the joinder of plaintiffs, *Smurthwaite* v. *Hannay*[4] will no longer apply in this country either. And as to the joinder of defendants, Rule 3 is an improvement on both S. 28 of the present Code and the corresponding English rule, with the result that the English cases like *Sadler* v. *Great Western Railway Co.*,[5] will henceforth have much less application in this country than heretofore.

1. (1568) Plowd. 864.
2. (1849) 3. Exch. 565.
3. (1850) 5. Exch. 124.
4. L. R. (1894) A. C. 494.
5. L. R. (1896) A. C. 450.

Thenappa Chettiar *v.* Marimuthu Nadan.—I. L. R. 31 M. 258.—In this case, the learned Judges hold that when a puisne mortgagee, who was not a party to a prior mortgagee's suit for sale, seeks to redeem the prior mortgage, he cannot claim the benefit of the terms of the decree in the prior mortgagee's suit, but can redeem only on the footing of the terms of the prior mortgage. It is difficult to see how, as a matter of *law*, any other view is possible. Our contemporary, the *Calcutta Law Journal*, is, however, disposed to take a different view. Commenting on this case, it observes : "It is unfortunate that the attention of the learned Judges of the Madras High Court was not invited to a later Privy Council case, *Kedar Mull* v. *Bishen Pershad*[1] * * * which shows that the view taken by this (Calcutta) Court is sound and equitable"—(Vol. VIII, p. 67 n.). It seems to us that this later decision of their Lordships only confirms the view acted upon by the learned Judges of the Madras High Court ; for in that case, their Lordships base the decision on the ground that 'the predecessor in title of the appellants was a party to that (the former) decree, and they say 'The High Court gives no reason for disregarding that decree and none was given at the Bar' The decision of their Lordships in *Ganga Pershad Sahu* v. *The Land Mortgage Bank*[2] is a further authority in support of the Madras view. We note that, in both the cases, the Judicial Committee reversed the decree of the Calcutta High Court on this point.

Our contemporary points out that in the case under notice 'the learned Judges do not make any attempt to controvert the reasoning of the Calcutta High Court' in *Gangadas* v. *Jogendranath.*[3] In the Calcutta case, it is said that the view therein taken is not inconsistent with the principles laid down by the Judicial Committee in *Umesh Chunder Sircar* v. *Zahoor Fatima*[4] and *Ganga Pershad Sahu* v. *The Land Mortgage Bank*[2] ; and in the later case of *Gurdeo Singh* v. *Chandrikah Singh*[5] the Court said that *Gangadas* v. *Jogendranath*[3] "is entirely in accord with the decision of the Judicial Committee in *Kedar Mul* v. *Bishen Prasad.*[1]" We agree with the Madras High Court that on the point now under consideration it is not possible to reconcile

1. (1904) I. L. R. 31 C. 332.
2. (1893) I. L. R. 21 C. 366.
3. (1907) 5 C. L. J. 315 : S. C. 11 C. W. N. 403.
4. (1890) I L. R. 18 C. 164.
5. (1907) 5 C. L. J. at p. 637.

Gangadas v. *Jogendranath*[1] with the decisions of the Judicial Committee. Nor is it consistent with that of the Calcutta High Court in *Girish Chunder Nandi* v. *Kedarnath Kundu*.[2] The judgment proceeds mainly on certain alleged equitable considerations which, however, are sufficiently answered by the learned Judges of the Madras High Court. On the other hand the view taken in the Calcutta case seems to us to be in the very teeth of the observations quoted in the Madras case from *Umesh Chunder* v. *Zahoor Fatima*.[3] The Calcutta High Court admits that the puisne mortgagee will not be bound by the accounts taken behind his back in the prior mortgagee's suit, though, of course, it refers to *Wrixon* v. *Vize*[4], as restricting his right to re-open the accounts to the specific grounds on which he may assail their accuracy. This is an instance of what the Judicial Committee referred to as depriving the prior mortgagee of the benefit of his decree.

One of the reasons assigned in the Calcutta case is that the prior mortgagee or purchaser in execution is entitled to possession only in his character of purchaser and not as mortgagee, and that if his suit for possession against the excluded puisne mortgagee were to be treated as, in substance, a suit to enforce the security against him, the prior mortgagee might be successfully met with the plea of limitation. We are unable to see the force of this reasoning. If the puisne mortgagee is not *entitled* to possession, he cannot resist the prior mortgagee-purchaser's claim to possession except under Art. 144, and if he claims to redeem the prior mortgagee, the sixty years' rule will apply. If, on the other hand, the puisne mortgagee is *rightfully* in possession, the prior mortgagee-purchaser cannot *eject* him and any claim to enforce the prior security, if otherwise barred as against the puisne mortgagee, will be placed in no better footing by the fact of his having obtained a decree against the mortgagor in the absence of the puisne mortgagee (Cf. *Aghore Nath Banerjee* v. *Deb Narain Guin*.[5] The decree cannot *as such* be enforced against him and the plea of limitation cannot be got over by offering to take the accounts on the footing of the decree. The puisne mortgagee cannot, by a fiction of law, be treated *as having so far been a party*

1. (1907) 5 C. L. J. 315, S. C.; 11 C. W. N. 403.
2. (1906) I. L. R. 33 C. 590.
3. (1890) I. L. R. 18 C. 164.
4. (1842) 2 Dr. & War. 192.
5. (1906) 11 C. W. N. 314.

to the prior mortgage suit as to be deprived of the plea of limitation in the second suit.

Secretary of State for India in Council *v.* Basharatullah.—I. L. R. 30 A. 271.—In this case the learned Judges hold that a person who produces in Court an insufficiently stamped document and desires to have it admitted in evidence may under Sections 40, Cl. (1) (*b*) and 48 of the Stamp Act, 1899, be *compelled* by the Collector to pay the proper duty and penalty. We are unable to accept this view, and we venture to think that if the attention of the learned Judges had been directed to the history of the law on the point they would have come to a different conclusion. They point out that S. 40, Cl. (1) (*b*) is silent as to the person from whom the payment is to be required. This omission seems to us intentional and is significant, especially when taken with the words " from whom the same are due" in in S. 48. In the draft Bill of 1877, Cl. 35, corresponding to to S. 40, provided that " the Collector shall require the person producing it, or in whose possession it has been found, to pay the proper stamp duty" with interest, and, in case of failure to pay the same, the Collector may recover it as if it were an arrear of land revenue. The Select Committee omitted the last portion of the clause empowering the Collector to recover the stamp duty as an arrear of revenue, and they further observed : " When the person from whose custody the instrument has come has not been concerned in the execution of it, it seems to us that it would, generally speaking, be unfair to *compel* him to pay......." (the italics are those of the Select Committee). It is in consequence of this that in S. 40 (1) (*b*) all reference to the person who is to be required to pay was omitted, and it will be strange if this omission is itself to be construed as authorising the Collector to levy the stamp duty and penalty from the person desiring to have the document admitted in evidence. Section 35, proviso (*a*), corresponds in some measure to S. 40, Cl. (1) (*b*), and in both cases the Court or the Collector only *fixes the amount* to be paid, without directing by whom it is to be paid. (Cf. proviso (*b*) to S. 35 which, on the other hand, expressly provides that the penalty of one rupee shall be paid by the person tendering the receipt). It was not the intention of the Act that the person tendering should be compelled by coercive process to pay the stamp duty and

penalty *whether or not* he wished to have the document admitted in evidence. Of course, if he wishes to make use of it as evidence, he must pay the stamp duty and penalty, and S. 44 provides that when the duty or penalty *has been paid* it can be recovered from the person legally liable. But the learned Judges misquote the section as applicable to any duty or penalty which *has been recovered* from a person, and then rely on it as justifying a compulsory levy from the person producing the document. Section 48 was, no doubt, added in the Act of 1899, but it authorises the Collector to recover duties and penalties from the person *from whom the same are due.* This means due under law, and not by the order of the Collector under S. 40 (1) (*b*); else the words would be unnecessary. And we should not so construe these words as practically to revive in whole Cl. 35 of the Bill of 1877, when the Legislature has not re-introduced the words of that clause authorising the Collector to levy duty and penalty from the person producing the document. The argument that a wrong levy by the Collector is good unless set aside by steps taken under Ch. VI of the Act seems to us to give to the order a conclusiveness not conferred on it by the Act. A party is not bound to invoke the aid of the Revisional Jurisdiction of the Board of Revenue, and even where the Board refuses to interfere, he certainly has a right, under the ordinary law, to impeach an illegal distress of his properties by the revenue authorities.

SUMMARY OF ENGLISH CASES.

In re **Dodson—Yales** *v.* **Morton.** [1908] 2 Ch. 638.

Order for sale—Administration action and partition action—Conversion of realty into personalty.

When in an action for the administration of an estate the Court, in the exercise of its undoubted jurisdiction, makes an order for the sale of realty, the order for sale will amount in itself to a conversion and the property will devolve on the death of the party entitled thereto on his personal heirs. Similarly also when the order is made in a partition action.

In re **Joseph—Pain** *v.* **Joseph.** [1908] 2 Ch. 507 (C. A.)

Substituted legacy—Subject to conditions of the original legacy—Rule not applicable when beneficiaries differ.

Though on general principles it cannot be doubted that in a simple case of a substituted legacy the substituted legacy is subject to the same conditions and incidents as the original legacy was subject to, the rule has no application to a case where the beneficiaries in a codicil are not identical with the beneficiaries in the will.

[The judgment of *Eve* J. in (1908) 1 Ch. 599 reversed].

S. S. Knutsford, Limited *v.* Tillmanns & Co.
[1908] A. C. 400.

Bill of Lading—Construction—" Ejusdem generis " principle.

A bill of lading provided that "if a port should be inaccessible on account of ice, blockade or interdict, or if entry and discharge at a port should be deemed unsafe in consequence of war, disturbance or of any other cause, it should be competent for the master to discharge the goods on the ice or at some other safe port or place.

Held: the words " unsafe" and " inaccessible ", mean unsafe or inaccessible for a period which would involve inordinate delay.

The words "any other cause" must be read as *ejusdem generis* with war or disturbance.

Fulton *v.* Norton. [1908] A. C. 451.

Statutory duty to submit petition—Breach of—Right to damages.

Under the British Columbia Crown Procedure Act, S. 4, it is the duty of the Provincial Secretary to submit to the Lieutenant-Governor a petition left with him as therein directed for that purpose. His refusal to submit the petition would give the petitioner a cause of action for damages which are not necessarily nominal and are to be estimated by the jury.

William Jose *v.* Metallic Roofing Company of Canada, Ltd. [1908] A. C. 514.

Strike as a result of resolutions of a Trade Union—Cause of action—Motive and conspiracy to injure essential.

The fact that the resolutions of a Trade Union calling on the plaintiffs' men to strike were responsible for the strike does not give

the plaintiffs a cause of action without regard to the motive and without regard to the question whether they had conspired to injure the plaintiffs in their trade or business and in pursuance of the conspiracy had called on the plaintiffs' men to strike.

National Motor Mail-Coach Company. *In Re* **Clinton's Claim.** [1908] 2 Ch. 514.

Voluntary payment—Discharge of statutory liability—Adoption of act by promoter—Company and promoter.

It is not law that whenever a person is under a statutory liability to pay a sum of money a third person may voluntarily pay the money and then sue the party who was really liable to pay it for money paid to his use. There must be a previous request, express or implied, to raise such an obligation, and in this respect there is no difference between the discharge of a statutory liability and the discharge of a contractual liability.

The mere fact that a promoter pays the registration fees and *ad valorem* stamp duty does not in itself entitle him to recover the same from the company either on the ground of having discharged a statutory liability of the company or on the ground that the company adopted or ratified the act of the promoter. There is no such thing in law as adopting or ratifying anything except where there is the sanctioning of an act professedly done on one's behalf in such a sense as to make one liable for it. A man can ratify that which purports to be done for him, but he cannot ratify a thing which purports to be done for somebody else.

Broderick *v.* **The London County Council.** [1908] 2. K. B. 807 (C.A.)

Workmen's Compensation—" Injury by accident"; meaning of.

Where a workman employed in a sewer contracted enteritis from inhaling sewer gas in the course of his employment :

Held, on a construction of the words " injury by accident " that he was not entitled to recover compensation. The words "by accident" are, " I think, introduced parenthetically, as it were, to qualify the word injury, confining it to a certain class of injuries,

and excluding other classes, as for instance, injuries by disease."[1] "It is not enough to show that the injury was had in the course of employment. The element of accident is necessary in order to bring the case within the authorities." So, cases where the nature of the work itself is such as will involve risk of injury, are excluded. [*Per Lord Macnaghten in Fenton* v. *Morley*[1].]

In re P. Macfadyen—*Ex parte* The Vijianagaram Mining Coy. Ltd. [1908] 2 K. B. 817. (C.A.)

Bankruptcy—Partnership—Misappropriation of Trust Funds —Proof against both separate and joint estates.

Per Cozens-Hardy M.R.—" It is, I think, well settled that if one member of a firm, being an express trustee, wrongfully concurs in a misappropriation by the firm of the trust funds, a proof may be allowed both against the joint estate and against the separate estate ; and it makes no difference that property came into the hands of the firm in the first instance for a specific purpose which the firm omitted to fulfil. Nor does it make any difference that the trust was not express and that the member of the firm had not originally possession of the trust fund. The same principle must apply to every case in which there is fiduciary relation resting upon contract such as a promoter or an agent; nor can I except the position of a director of a company."

The *general* rule is against double proof.

Baker *v* Snell. [1908] 2 K.B. 825 (C.A.)

Master and Servant—Question whether servant acts within the scope of his employment, one for jury—Savage dog—Absolute liability of the owner.

Plaintiff was bitten by a dog known to its master to be savage, the biting being the result of the wilful mischief of the keeper. The Court of appeal (*Kennedy* L. J. dissenting) held: An owner of a dog known by him to be savage keeps it at his peril and is liable for its bite even if it be through the wilful act of a third person except where the plaintiff by his own conduct has brought the injury upon himself.

1. (1903) A. C. 443, 448.

By the whole Court—It is a question for the jury whether, when a servant did an act, he was acting within the scope of his employment. [*May* v. *Burdett*[1] followed].

"The Forfarshire." [1908] P. 339.

Contract—Construction—Negligence—Exemption—Duty to use reasonable care, in spite of.

The defendant undertook to repair plaintiff's damaged ship himself finding all items of transportation, but in the margin of the letter of the defendant which together with the letter of the plaintiff's acceptance contained the contract, there were the words: "All transporting to be at owner's risk."

Held that the marginal note about exemption did not absolve the defendant from the consequences of his negligence in providing all items of transportation which he expressly undertook to find, and that the defendant, before he could call in the aid of the exemption, must show that he used all reasonable care and precaution.

JOTTINGS AND CUTTINGS.

Bombay in the days of George IV.—By PERCY A. ATHERTON—To the reader, this story of the conflict of the King's Court with the East India Company, and the struggle of the King's Judges to curb the headstrong officials of the Company, seems well nigh inconceivable. Respect for the authority of the State, and respect for its Judiciary, have come to be to-day so much a part of daily life as to pass unnoticed. Yet this life of Sir Edward West, this defence of the right of an English Judge to administer justice, under strange conditions and in the face of great difficulties, throws an interesting light on the strength and vigor of Anglo-Saxon institutions.

Born in 1782, Edward West had the sturdy training of Harrow, and opportunities of University College, Oxford, a typical English education of the best sort.

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1. (1846) 9 Q. B. 101.

In 1814, at the comparatively youthful age of 32, he was called to the Bar of the Inner Temple. In the meantime he had been elected a Fellow of his College and had done notable work in economics. Eight years later, after a moderate success at the Bar, he was appointed Recorder of Bombay, and knighted as Sir Edward West.

India, at the end of the eighteenth century, was governed by the East India Company, and the administration of justice was at a very low ebb. Mere boys, with little training or experience, were sent by the Company to India to sit in the Provincial Courts, and matters had reached such a state that King's Courts were created in 1799 to curb the East India Company's growing power, and to give to the native some degree of protection to life and prosperity—both endangered by the aggressiveness of the Company.

As may well be seen, the position of a King's Judge, sent out from England by the Crown, was anything but enviable. The East India Company looked on him with distrust and disfavour, and the natives had not yet learned that a Judge could act with uprightness and independence. The Company regarded the Sovereignty of India as its own private property, and resented all interference with it by the British Parliament as an unwarranted invasion of its rights. Under such conditions it was impossible for a Judge, who did his duty as he saw it, not to come into collision with the traditions of the Company. He faced a European colony hostile to him; he lacked the moral support of an independent public opinion; and further, he had to apply Anglo-Saxon theories of Justice to Native Indian conditions. Nevertheless, Edward West, married on the eve of his sailing for India, did not hesitate for a moment. His entire work in India was crowded into brief years, first as "Recorder of Bombay," then as "Chief Justice of the Supreme Court of Judicature"—the successor of the Recorder's Court—yet, even then, he served longer than the average of the early English Judges in India. In the first quarter of a century of the King's Court not one King's Judge lived to return to England, and the average length of their service was a little over three years.

Throughout his six years' service as a Judge, West seems to have been in constant conflict with the East India Company.

He had scarce arrived in India when the new Supreme Court of Judicature was substituted for the old Recorder's Court, and he became its Chief Justice.

That he proposed to reform the Bench and Bar was evident from the outset. Within a month after he was sworn in as Chief Justice he dismissed the Master in Equity and the Clerk of Court, both for irregularities of professional conduct. He next suspended from practice, for over-charges made to clients, five of the six barristers practising in his Court. He insisted that the English residents must perform their Jury duty, and he reformed the administration of the Jails. These reforms, all of them of vital necessity to the proper administration of justice, created violent opposition from successive Governors of the Company.

In 1825 West, in an elaborate charge to the Grand Jury, then sitting, urged an investigation of the treatment of native prisoners by the lower Courts, which were run entirely by the Company, and an investigation into the unnecessary severity, and even illegality of many sentences pronounced by the Company's Judges and Police Magistrates. Unfortunately the Grand Jury declined to act, great as was the need of a reform in the Company's treatment of the natives, and West's charge to the Grand Jury seems only to have aroused the increased enmity and hostility of the Company and its officers. At the same time there was great unrest and ill-feeling in the Colony as is shown by the following paragraph: " The new year 1826 found Bombay society in a quarrelsome mood. Mr. Norton, the loud-voiced Advocate-General to the Bombay Government, had been challenged by a Mr. Browne, but had refused to go out with him. Martin West (Sir E. West's nephew), had been insulted by Mr. Norris, a Member of the Bombay Government, and had been obliged to demand an apology. Mr. Graham, an Attorney, had libelled and had challenged Mr. Irwin, barrister, and, on the challenge being declined, had horse-whipped him. Mr. Warden had circulated a defamatory paper aspersing the character of Mr. Graham, and trials for assault and libel occupied the attention of the Supreme Court." Truly a most unhappy picture of life in the small English Colony at Bombay!

In this stormy atmosphere it occurred to those who were smarting under West's recent charge to the Grand Jury, and who

looked upon an independent King's Court as a nuisance, that the Chief Justice might, with advantage, be provoked into a duel. Accordingly the Company's Governor, Ephinstone, openly insulted the Chief Justice at a dinner, and upon the Chief Justice's asking for an explanation, the Governor promptly sent him a challenge. This, West, in a very manly way, declined, pointing out the disgrace that would thereby be brought upon his Court, but the entire episode made West's work more trying and more difficult.

Through all these troublesome times, West was constantly endeavouring to improve the condition of the Natives, and to soften the harshness of their treatment by the Company. One difficult problem he worked out was a set of " Rules" regulating the service of Mahometans, Hindoos and Parsees upon Juries."

The difficulty of this in connection with the "caste" system may well be imagined.

This was the last work he did. In August, 1828, he was suddenly seized with a malady not recognized by his physicians, from which after an illness of a few days, he died. An added touch of sadness was the death of Lady West two weeks later, in giving birth to a son who did not survive.

The striking feature of this brief and tragic story of West's life and work lies in the almost superhuman difficulties overcome by the King's Judges in India. Sir Edward West, in the face of these difficulties, upheld the best traditions of the English Judiciary. He was a fearless, high-minded Judge—an honor to the profession of the law, a friend to the people of India.—*The Green Bag.*

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The Damnation of the Modern Bar.—The lawyer has been abused time out of mind, but somehow or another he has never seemed to mind it much. Every now and then he may say something concerning the attacks upon him, but not in anger, or by way of apology or defence. He treats his critics with about the same degree of good-humoured tolerance that a St. Bernard shews to a barking Toy Spaniel. If the spaniel chooses to bark, why, it is all right, because it does not hurt the big dog and may amuse the little one. Besides, it may afford the St. Bernard some pleasing reflections on the difference between big dogs and little ones.

Since, then, lawyers have been so generally and so long abused, why have they not resented it? There are several reasons. As has been suggested, the lawyer's indifference to abuse is partly due to a feeling of superiority to the abuse, if not to the abusers. He knows full well that he has been, and is, entrusted with the making, with the construction, and with the enforcement of the laws. He realizes that inasmuch as he has been in a hopeless minority he would not have been invested with such full powers but for good reasons—reasons which have prevailed in spite of the expressed distrust of him. To paraphrase Bancroft's words, he knows that "in the exploration of the region of liberty not a cape has been turned or a river entered, but a lawyer has led the way."

It may be that the lawyer feels a sense of sureness of himself that is not felt by the generality of men. According to Plutarch, one of the two sentences inscribed upon the Delphic Oracle was "know thyself." The lawyer knows himself. Knowing himself, he knows other men. Bearing in mind David's lament for his hasty remark that "all men are liars," he makes due allowance for the intemperate or foolish remarks of an angry or a misguided man. He knows that the one will repent his utterances, and that the other is incapable of appreciating their folly.

Another reason for the lawyer's indifference to lay criticism is that he feels that if he has earned the approbation of his brethren, he has acted well his part. There is nothing he prizes more than the esteem of his fellow lawyers, and nothing he dreads of more than their contempt. He knows that if he plays the game, and plays it fairly, he will win generous applause, and that, if he does not, he will earn and receive professional ostracism. He feels that the good opinion of his brothers more than compensates him for outside flings, and that, without that good opinion, nothing else is worth while.

Perhaps another reason for the lawyer's tolerant attitude is that he makes due allowance for the character or motives of those who censure him.

The most vociferous critic of the lawyer is the man who is, for cause, fearful of receiving justice. As compared to any other critic, his voice is as the bray of an ass to the chirp of a cricket. It is easy to dispose of this enterprising gentleman's cry of "Stop

thief!" A mere suggestion of his motive is sufficient. As Turnbull hath it :

> " No man e'er felt the halter draw,
> With good opinion of the law."

Or as Seymour D. Thompson said in one of his Bar Association addresses : " Lawyers have always been an inconvenience to despots. The tyrant is always stubbing his toe against the lawyer. Napoleon, the son of a lawyer, hated lawyers." Another despot's attitude towards lawyers is well illustrated by an anecdote concerning him which has been handed down. When Peter the Great, on his visit to Westminster Hall, was told, in answer to a question, that the people in wigs and black gowns were lawyers, he exclaimed: " Lawyers! I have but two in my dominions, and I believe that I shall hang one of them the moment I get home." The other one must have been Peter's "personal counsel"—to borrow a phrase which the New York papers delight in using.

The incorrigible Jester, with his merry quibs and gibes about the lawyer, comes on next to do his little turn. The lawyer simply can't find it in his heart to be harsh toward this sad wag. He regards him with good nature, and even with sympathy. He has heard the creaking of the machinery, and has seen what a serious thing it is to be a funny man. Besides, he rather likes to study the species.

" Well, well," says the lawyer, when he hears his story, "let the little man have his joke, if it pleases him. It does not do any harm, it does not do any harm. Besides, it's been some time since I heard that joke ; and it does not do to go back on old friends." Perhaps the next evidence of the lawyer's sureness of his position is, not that he ignores criticism, but that he laughs at the jokes made at his expense.

While the lawyer is tolerant of all kinds of criticism, there is one kind that puzzles him on account of its want of logic, and that is the criticism of the so called " corporation lawyers." He can understand an attack based on the charge that lawyers are dishonest, but he cannot understand an attack based on the charge that corporation lawyers are corporation lawyers. The head and front of the corporation lawyer's offending seems to be that he makes money, wears a coat of good cloth and rides instead of

walks. It seems to be considered to be in some mysterious way unprofessional for a lawyer to serve artificial rather than natural persons and to reckon his income in thousands instead of in dollars. It is, of course, true that there are some disreputable corporation lawyers. But it is also true that the corporation lawyer, equally with all other lawyers, is amenable to the punishments meted out by the bar to members who fail to live up to its best traditions, and that he is equally desirous of earning the esteem of his brother lawyers, and equally afraid of incurring their contempt.

Well, no matter, what the other fellow may say, while things are running smoothly, the moment he gets in a tight place or the moment he is confronted with a troublesome problem, or the moment he feels the need of some one to trust, he hies him straightway to the lawyer.

"For 'its Tommy this, an' Tommy that,
—And chuck him out, the brute !
But it's saviour of 'is country, when
The guns begin to shoot."—*Law Notes.*

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The Nature of an Easement:—In the last two numbers of the *Law Quarterly Review* a mild controversy has been carried on with respect to the juridical nature of what is known in English law as an 'easement.' Is an easement to be classed among incorporeal hereditaments, or is it only a right, appurtenant or otherwise?

Singularly enough, no reference is made in the course of this controversy to the case of *The Metropolitan Railway* v. *Fowler*[1] decided by the House of Lords in 1893. In that case 'mere easement' was sharply contrasted with 'hereditament' and the rights to occupy and use a portion of the subsoil for the purposes of a railway was held to be a hereditament, as distinguished from an easement, within the meaning of Section 4 of the Land Tax Act, 1797 (38 Geo. III. c. 5.). That section makes taxable almost every conceivable interest in land including 'fishings, tithes, tolls, annuities, and all other yearly profits, and ***all hereditaments of what nature or kind soever they may be in England***'. This would, of course, include incorporeal hereditaments,

1. 68 Law J. Rep. Q. B. 553.

and necessarily easements if they be incorporeal hereditaments. Nevertheless, it was held that had the right to use the tunnel been a 'mere easement,' a 'bare easement', this right or interest would not have fallen within the classes of interests in land set out in S. 4. Lord Watson referred to an 'easement' as being 'a mere burden upon the proprietory right of the owner in fee.' The fact is that the law of easements is deeply penetrated with the rules and conceptions of the Roman Law of servitudes. In turning over the pages of 'Gale on Easements', the number of citations and quotations from the 'Corpus Juris' is surprisingly large for a text book on English law.

The difference between the law relating to ordinary estates and interest in land, and the law relating to easements and analogous rights, is also illustrated by the difference in the principles that underlie the acquisition of ownership of the soil itself by length of possession under the Limitation Acts, and the acquisition of appurtenant rights by prescription and its ancillary doctrine of lost grant. A title to the ownership in fee under Limitation Acts by no means assumes or requires a lawful origin —rather the contrary. On the other hand, the doctrines of prescription and lost grant so distinctly assume a lawful origin as the basis of title that any presumption of acquisition of rights in the nature of easements may be rebutted by showing the impossibility of any actual grant having been made.—*London Law Journal.*

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The Cost of the High Court.—Do suitors in the High Court pay their way? This question, which is of some importance in view of the urgent need for an increase in the number of King's Bench Judges, admits of a more favourable reply than is evident at the first glance of the yearly return of the receipts and expenditure of the High Court. The receipts during the year ending March 31 last amounted to £ 504, 467; and the expenditure to £654, 924. This, it is true, shows a deficit of £150, 457; but when the large amount of time which the King's Bench Judges and officials devote to criminal and other Crown work, both in London and in circuit, is borne in mind, the cost to the country of legal administration in civil matters becomes more apparent than real. The retiring annuities of Judges and the pensions,

compensations, and superannuation allowances of officers amount to nearly £ 100,000. The circuit system, too, is responsible for a large addition to the expenditure. The 'circuit expenses of the Judges and their suites' amounted to £ 13325; the "fees paid to the marshals of the Judges on circuit" to £ 2,100. The last mentioned item, which occurs regularly in the High Court balance-sheet, would, presumably, disappear if the Bench were properly manned. At any rate, there is nothing in this annual account to justify the unwillingness of the Treasury to provide the necessary funds for insuring the speedy administration of the law. 'One of the greatest functions of the State', said Lord *Halsbury* not long ago, 'is the administration of justice'. It certainly cannot be complained that the discharge of this function, so far as the High Court is concerned, constitutes a heavy charge upon the national funds.

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A visit to George Eliot's country (says the *Globe*) is among the numerous festivities with which the members of Law Society will relieve the business programme of their coming meeting at Birmingham. The pleasure of the visit is not likely to be disturbed by a recollection of the hard things which are said of the law and lawyers in some of George Eliot's novels. 'Mr. Julliver was a strictly honest man and proud of being honest, but he considered that in law the ends of justice could only be achieved by employing a stronger knave to frustrate a weaker. Law was a sort of cockfight, in which it was the business of injured honesty to get a game bird with the best pluck and the strongest spurs'. But the author of 'The Mill on the Floss' is careful not to put forth Mr. Julliver's views as her own. She describes his conclusion that 'rats, weevils and lawyers' were created by old Harry as 'questionable'. Lawyers have been known to wonder how George Eliot contrived to be so accurate in the legal details of her novels. The explanation is that she was wont to consult Mr. Frederic Harrison, who, before he devoted himself to literature, was a practising member of the Chancery Bar. In the construction of the intricate legal plot in 'Felix Holt' she had in addition to Mr. Harrison's, the help of the late Lord Herschell, then a barrister of some six years standing.

Another great lawyer—the late Lord Bowen—was consulted as to an incidental point of law in 'Daniel Deronda'. The

Attorney-General's 'opinion' printed in italics in one of the later chapters of 'Felix Holt,' was written entirely by Mr. Harrison.

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Miscellany.—The approaching retirement of Sir Francis Maclean, Chief Justice of Bengal, will remove from the Indian Bench its most picturesque figure, and will render vacant the most important and attractive judicial position in the Empire outside Great Britain. Sir Francis Maclean, formerly member of Parliament for Mid-Oxon, has occupied it for eleven and a half years, a period rather more than sufficient to entitle him to a full pension. The question of his successor has for some months been the theme of eager discussion in Anglo-Indian circles. Unofficial opinion in India (says the *Westminster Gazette*) tends strongly to the view that, especially in these difficult times, the Chief Justice of Bengal should be a barrister appointed direct from England. The Chief Justice is in precedence second only to the Lieutenant-Governor. His salary is £ 4,800 a year and he has the opportunity of a yearly visit to England.

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Indian Law Students in England.—A correspondent of the *Times*, referring to the position of Indian students in England, writes :—Many of them seem to be entirely without funds, and their stay here can only be a period upon which to look back with regret. A time of idleness, of course, is full of dangerous temptation, and in that respect the course at the Inns of Court is particularly fruitful. The Indian students frequently pass their examinations with rapidity, and then comes a period of waiting for the "Call to the Bar." The Benchers may make a special exemption from the number of dinners to be eaten, but after that allowance has been deducted, there is an interval of inactivity, when the fact of having passed the examinations affords an excuse for indulgence.

But in so far as the plans proposed to remedy this state of affairs "fall short of the residential club", they are likely to fail in effecting any thorough improvement in the existing conditions. In the educational reforms carried out during Lord Curzon's Viceroyalty, nothing, perhaps, was more beneficial than the encouragement given to the establishment of hostels in connection with the Universities. If they are necessary there, then how much

more so in a strange land ? Could not the Council of Legal Education take action in the matter so far as the students at the Inns of Court are concerned, and an experiment on their part provide the foundation for further action ? The Council recently showed, in another direction, that they are alive to the needs of students from across the seas, so it is not unreasonable to hope that, with the aid of those who have Indian University experience, they will take action in establishing in London, for the students of the Law, a place of residence upon similar lines.

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The Supreme Court of Judicature cost during the last financial year £ 654,924-13*s*.-4*d*., and the amount received in fees was £ 504,467-1*s*.-4*d*. Consequently the tax payers had to find about £ 150,000. This seems a cheap bill for the administration of Civil Justice in that tribunal. Why not appoint two more High Court Judges ? Plenty of work could be found for them.

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An amusing story is told at the expense of a prominent Baltimore Lawyer, who, like most young attorneys, got his first case by assignment from the bench. His client had been indicted for murder, and his conviction was a foregone conclusion, as his guilt was unquestionable.

The result of the trial was a sentence to be hanged ; but the man made an appeal to the Governor for a pardon, and was anxiously awaiting a reply thereto when his Lawyer visited him in his cell.

" I have got good news for you—very good news!" the young Lawyer said, grasping the man's hand.

" Did the Governor—is it a pardon ?" the man exclaimed, joyously.

" Well, no. The fact is, the Governor refuses to interfere. But an uncle of yours has died and left you 200 dollars, and you will have the satisfaction of knowing that your lawyers got paid, you know," was the comforting explanation.—*Harper's Weekly.*

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Justice in Hungary.—An Englishman was travelling in a wild part of Hungary, and made an application to a Town Magistrate, asking to hear how justice was conducted.

The Magistrate, gorgeous in a magnificent Magyar costume, received him cordially, and sent for any case which might be awaiting trial.

A gigantic gendarme in an immense cocked hat ushered in a prisoner, a plaintiff and a witness. The prisoner was accused of stealing the plaintiff's goose.

"Well, Sir," said the Magistrate to accuser, "what have you to say?"

"Please, Your High Mightiness, the prisoner stole my goose."

The Magistrate turned to the witness.

"What have you to say?"

"Please your High Mightiness, I saw the prisoner steal the goose." The Magistrate then delivered the sentence.

"I give you a fortnight in prison," he said to the accused, for stealing the goose.

To the plaintiff he said :—"I give you a fortnight in prison for not looking after your goose," and turning to the witness, "You shall have a fortnight in prison for not minding your own business."—*Chicago Legal News.*

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Absence of Attorney from Court as Contempt.—The St. Louis Court of Appeals in the case of *In re* Clark, 103 South Western Reporter, 1105, holds that the absence of an attorney from the Court in which he has business, and when he should be there to attend to it, and where his absence delays or impedes the Court's business, constitutes a Contempt of Court. An attorney at law is an officer of the Court, and it is as much incumbent on him to attend the sittings of the Court when a case in which he is counsel is on trial, and which trial cannot proceed in his absence, as it is for the Sheriff or the Clerk of the Court to be present.—*The Law Students' Helper.*

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Order—No. 1583, *Judicial, dated 23rd November* 1908.—The Governor in Council is pleased, with the previous sanction of the Government of India, to invest all courts of Subordinate Judges and all courts of District Munsifs in this Presidency, with jurisdiction under the Provincial Insolvency Act, 1907 (III of 1907),

in respect of all cases of petitions by debtors where the debts do not exceed Rs. 5,000 and Rs. 2,500 respectively.

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Order—No. 937, *Public, dated 24th November* 1908.—His Excellency the Governor in Council has received with very deep regret the intelligence of the death of Sir Vembakam Bhashyam Aiyangar, *Kt.*, C.I.E., and desires to record his appreciation of his high character as well as of the public services rendered by the deceased in the course of a long, strenuous and distinguished career.

He served almost continuously as a member of the Provincial Legislative Council since his first nomination to it in the year 1888, and in that capacity he was ever ready to place his great abilities as a jurist and his intimate acquaintance with the practical working of the laws at the service of the Council.

So pre-eminent a position had he attained in his profession that he was appointed to officiate as Advocate-General in the Presidency, being the first Indian to occupy that great place, the duties of which he performed with fidelity and indefatigable industry. In 1901 he was elevated to the Bench as a Judge of the High Court of Judicature, an office which he discharged with conspicuous ability and with great satisfaction to the public.

His public services and his high personal character have been recognized by the Government on many occasions. His loss will be greatly felt both by the Government and the people. The memory of his honourable life will long survive him to furnish an inspiring example to his countrymen.

2. A copy of these Proceedings will be communicated to Lady Bhashyam Aiyangar with an expression of the sympathy of His Excellency the Governor in Council with her and her family in their bereavement. A copy will also be published in the *Fort St. George Gazette.*

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For paragraph 276, Civil Rules of Practice, *read* :

" Save as provided in paragraph 2 of this rule, every vakalatnàmah or appointment of a pleader shall be executed, or its execution attested, before a judicial functionary, a gazetted officer, or an assistant monigar or other assistant village headman, who

shall sign his name, adding his designation, on the vakalatnamah in authentication of its execution or attestation.

" When the executant of a vakalatnamah is himself a public officer of whose signature a court must take judicial notice, authentication of the vakalatnamah shall not be necessary.

" A statement of the pleader's address for service shall be endorsed on the vakalatnamah and signed by the pleader."

REVIEWS.

Hindu Family Law: By E. J. Treveleyan, D.C.L., Barrister-at-Law, late a Judge of the High Court at Calcutta, published by Messrs. Thacker Spink & Co. Price Rs. 16.—In this book Mr. Trevelyan, attempts to deal with the family law of the Hindus. The principal subjects dealt with are Marriage, Adoption and Joint Family. Two chapters are added, one on debts and the other on partition. The plan adopted in the book is to state the law which, in the opinion of the author, is the result of the judicial decisions and to give reference to the cases supporting the rule and not to write a discursive treatise. As such it will be useful to the student and also to the practitioner. We may without disparagement to his other works state that this book is better than the author's works on "Minors" and "Hindu Wills."

We have tested the book in a number of places and found the law stated fairly accurately. We, however, find that the author in dealing with the co-parcenary property in Chapter 6 states the following:—"In cases governed by the Mitakshara School of Law, property inherited from a mother is co-parcenary, but it is unsettled whether property inherited from the maternal grand father is also co-parcenary property." In thus stating the law the author apparently forgets a passage to be found one or two pages before where he states law the more accurately. "Property inherited from the maternal grand-father by two persons living as members of a joint family is, in a case governed by the Mitakshara Law, on a similar footing". He then cites a Madras case and states its effect. The first part in the former passage cited, though it may, perhaps, be the Mitakshara Law of the Sanskrit commentators, has not been adopted by the Full Bench decision of the Madras High Court in *Karuppai*

Nachiar v. *Sankaranarayana Chetty*,[1] referred to by the author. The latter part of the former passage would have been correct before the *Jagampet case*[2] and all the decisions cited in support of it by the author are anterior to the decision of the Judicial Committee. In fact in the previous page the learned author refers to this decision of the Judicial Committee and states its effect accurately in the second part of the passage cited.

Book-mark and Calendar for 1909: Published by Messrs. Rama Iyar & Co., Booksellers, Publishers and Stationers, Esplanade Row, Madras.—Messrs. Rama Iyar & Co. have cleverly conceived the idea of making the calendar of the New Year which they are annually issuing serviceable also as a book mark. They have given a portrait of that eminent jurist, advocate and judge—the late Sir V. Bhashyam Iyengar—whose lamentable death is a great loss to the country.

Acknowledgments.

We beg to acknowledge receipt of the following publications :—

Book Mark and Calendar for 1909, published by Messrs. Rama Iyar & Co., Book-sellers, Publishers and Stationers, Esplanade Row, Madras.

The Indian Practice : By M. L. Agarwala : Vol. II.

Allahabad Law Journal for	November 1908.
Allahabad Weekly Notes	Do.
Bombay Law Reporter	Do.
Burma Law Reporter	Do.
Calcutta Law Journal	Do.
Calcutta Weekly Notes	Do.
Canada Law Journal	Do.
Canada Law Times	Do.
Central Law Journal	Do.
Chicago Legal News	Do.
Criminal Law Journal	Do.
Digest of Civil Law (English) Part II Book III by Jenks.	Do.
Harward Law Review	Do.
Hindustan Review	Do.
Kathiawar Law Reports	Do.
Law Magazine and Review	Do.
Law Students' Helper	Do.
Law Students' Journal	Do.
Punjab Law Reporter	Do.
The Law Journal	Do.
The Lawyer	Do.

1. (1908) I. L. R. 28 M. 1.
2. (1902) I. L. R. 25 M. 678.